

Supreme Court, U. S.
FILED

DEC 9 1977

MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. ~~77~~... **829**

BOYCE NEAL PATTERSON and JIMMY WAYNE MURPHY,
Petitioners,

v.

STATE OF ARKANSAS,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Arkansas

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v.

STATE OF ARKANSAS,
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PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Arkansas

JURISDICTION

The Judgment of the Supreme Court of Arkansas was entered on the 12th day of September, 1977, in the form of a denial of a Motion For Rule On Clerk and such order constitutes the final action of the said Arkansas Supreme Court. This Petition for Certiorari was filed within 90 days of the latter date. This Court has jurisdiction under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

Whether Ark. Stats. 27-2127.1 and Rule 5 of the Supreme Court of Arkansas and the action of the Clerk of the Supreme

Court of Arkansas pursuant to that statute and that rule are violative of the Petitioner's due process rights under the Fourteenth Amendment to the United States Constitution.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

a.) Article 27-2127.1, *Ark. Stats. Ann.* (Supp. 1971) reads as follows:

The record on appeal shall be filed with the appellate court and the appeal there docketed within 90 days from the date of filing the notice of appeal; except that, the trial court may prescribe the time for filing and docketing, which in no event shall be less than 90 days from the date of filing the first notice of appeal. In all cases where there has been designated for inclusion any evidence or proceeding at the trial or hearing which was stenographically reported, the trial court, after finding that a reporter's transcript of such evidence or proceeding has been ordered by the appellant, in its discretion and with or without motion or notice, may extend the time for filing the record on appeal and docketing the appeal, if its order for extension is made before the expiration of the period for filing and docketing as originally prescribed or extended by a previous order; but the trial court shall not extend the time to a date more than seven (7) months from the date of the entry of the judgment or decree.

b.) Rule 5 of the Rules of the Supreme Court of Arkansas reads as follows:

Rule 5. Motion for Rule on Clerk

(a) Where a record is tendered, which in its face appears to be without the time allotted for docketing the case in this court,

it shall be the duty of the clerk to so notify the attorney representing the appellant, and note on the record the date said tender was made.

(b) If appellant insists that the clerk is in error in refusing to file the record, then upon payment of the regular filing fee, the case shall be tentatively docketed and numbered for the purpose of determining this question. Thereupon appellant shall file a motion for a rule to require the clerk to docket the case as an appeal. Copy of said motion shall be served by appellant upon opposing counsel, and evidence of that fact must be furnished at the time of filing.

(c) If the rule is granted the case shall proceed in the regular manner for appeals, under the same docket number, without payment of any additional filing fee.

(d) If the rule is denied the case shall be stricken from the docket, and the filing fee treated as costs accrued.

c.) Section 1 of the Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

Nor shall any State deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

Petitioners were arrested and charged with the offense of Theft pursuant to Ark. Stats. § 41-1806 (1-21). Said Defendants were convicted by jury and sentenced to five (5) years in the Arkansas State Penitentiary (under Arkansas law, the jury fixes the punishment.)

Petitioners then duly perfected their appeal by the filing of a Notice of Appeal and Designation of Record on the 19th day of May, 1977. Petitioners' attorney then requested the prepara-

tion of a transcript of the facts elicited in the trial of this cause and said transcript was mailed to the Circuit Clerk of Miller County, Arkansas on the 5th day of August, 1977. On the 16th day of August, 1977 the attorney for Petitioners was notified by the Circuit Clerk that she had in her possession said transcript. On the following day said attorney obtained said transcript, and mailed it to the Clerk of the Arkansas Supreme Court. Upon receipt the Clerk of the Arkansas Supreme Court refused to lodge the transcript thus terminating Petitioner's appeal.

On August 27, 1977 Petitioners filed their Motion for Rule on the Clerk pursuant to Rule 5 of the Rules of the Supreme Court of Arkansas. Petitioners presented the factual basis for their request that the transcript be lodged in Petitioners' Motion in the Appendix of this Petition. Said Motion was denied by the Clerk of the Supreme Court on the 12th day of September, 1977 without consideration by the Supreme Court of Arkansas or any Justice thereof.

REASONS FOR GRANTING THE WRIT

1. This case involves the late filing of the Record in the Supreme Court of Arkansas after due notice of appeal was given by your petitioners. These Petitioners filed a timely Notice of Appeal on the 19th day of May, 1977, from an adverse verdict of the Circuit Court in and for Miller County, Arkansas. Petitioners ordered a transcription of the trial in which the verdict was rendered against them, and said transcript was filed by the Circuit Clerk of Miller County, Arkansas on the 8th day of August, 1977. Then on the 16th day of August, 1977, the Circuit Clerk advised the attorney for Petitioners, Boyd Tackett, Jr., that the transcript was filed in the Circuit Court of Miller County, Arkansas. The attorney for the Petitioners immediately went to the Clerk's office and mailed the transcript to the Supreme Court on the 17th day of August, 1977, whereupon it was received by the Supreme Court of Arkansas on the 19th day of August, 1977. The Clerk of the Arkansas Supreme Court refused to accept and file the record because it was not tendered within 90 days as required by *Ark. Stat. Ann.* § 27-2127.1 (Supp. 1971). (See Appendix for above.)

Your Petitioners readily admit that the record was tendered to the Clerk of the Arkansas Supreme Court on the 92nd day after the Notice of Appeal was filed, but it is to be noted that it was placed in the mail of the United States Postal Service on the 90th day after the Notice of Appeal was filed. Immediately after being notified that the Clerk of the Supreme Court of Arkansas would not accept the record, the attorney for the Petitioners, Boyd Tackett, Jr., filed a verified Motion for Rule on Clerk in accordance with Rule 5 of the Rules of the Supreme Court of Arkansas, setting forth in detail the reason for the late filing. (See Appendix). Said Motion for Rule on Clerk to lodge transcript was denied by Order of the Supreme Court of Arkansas dated the 12th day of September, 1977, and from this denial, Petitioners urge this Honorable Court to grant its

Writ of Certiorari to allow these Petitioners to file their appeal, said denial being a deprivation of their due process as guaranteed to them by the United States Constitution under the Fourteenth Amendment.

The Arkansas Supreme Court in *Bernard v. Howell*, 496 S.W.2d 362 (1973) pointed out that the Supreme Court of Arkansas should exercise its inherent discretion in ordering the Clerk to accept the record and docket the appeal because of unavoidable casualty, exceptional circumstances or lack of prejudice to the adversaries. Your Petitioners would point out that this is an appeal of a criminal case. *Bernard* has pointed out that "this Court has been very liberal in accepting late appeals in criminal cases, but we have held that § 27-2127.1, *supra*, does not apply to criminal cases. *Philyaw v. State*, 277 S.W.2d 484 (1955). Your Petitioners are aware of the case *Holman v. State*, 515 S.W.2d 638 (1974) wherein discussing a failure to file record in accordance with *Ark. Stats.*, § 27-2127.1, the Court stated "we therefore permit the record to be filed in this instance, but after January 1, 1975 the statute will be applied according to its terms". *Holman* was a case involving the appeal of a criminal decision. Your Petitioners would argue that this specific case of *Holman v. State* is not to be applied generally to the criminal justice system of the State of Arkansas but that it was to be applied to this case only. Reading *Holman* could easily give a reading that the Supreme Court of Arkansas intended *this case*, after allowing the filing of the record, to be applied in strict accordance with *Ark. Stats.* 27-2127.1, and that they would not entertain any more extensions for filing the record in this specific cause. The same court in *Gallman v. Carnes*, 492 S.W.2d 255 (1973) also had an occasion to interpret *Ark. Stats.* 27-2127.1, this being a civil proceeding, and at the end of this opinion went to great length in adopting a rule in the appendix of said opinion, to-wit:

"Effective August 1, 1973, in the absence of a showing of unavoidable casualty all appellate records must be filed with

the Clerk in compliance with *Ark. Stats. Ann.* 27-2127.1 (*Supp.* 1971) . . ."

By looking at the *Gallman* and *Holman* cases as decided by the Supreme Court of Arkansas which have interpreted *Ark. Stats.* 27-2127.1, your Petitioners would argue and urge that the Supreme Court of Arkansas has made a definite and certain rule with reference to filing appeals from civil causes of action, but that the Court is more lenient with reference to filing appeals from criminal cases in accordance with prior case law. *Bernard v. Howell, supra; Philyaw v. State, supra.*

2. Your Petitioners would show that *Ark. Stat.* 27-2127.1 is based on Rule 73, Paragraph G of the Federal Rules of Civil Procedure (Compiler's Notes to *Ark. Stat.* 27-2127.1, Appeals to Supreme Court as found in the Arkansas Statutes). Your Petitioners would urge that it was the intent of the legislature of the State of Arkansas in basing certain of their Rules of Civil Procedure upon the Federal Rules of Civil Procedure that they intended to follow the thrust of other rules in the Federal Rules of Civil Procedure that would be applicable. Petitioners would show that Rule 73 is now embodied in Rule 11 of the Federal Rules of Civil Procedure, and that even though the time differential for docketing the appeal is different, that the procedure should be the same. Rule 11(b) of the Federal Rules of Civil Procedure teaches us that transmission of the record is effective on the *date* that the District Clerk mails, or otherwise forwards the record to the Clerk of the Court of Appeals. In the case at bar the attorney for the Petitioners mailed the required transcripts on the 17th day of August, 1977, the day that said transcript was due in the Supreme Court of Arkansas, and for this reason, and because of all our experiences with the United States Postal Service, the Rule in Arkansas should be the same as the Federal Rules of Civil Procedure to prevent injustice and due process violations as are being urged before the Court in this cause. To hold as the law appears to

be in the State of Arkansas that it is the duty of the Petitioners' counsel to keep a watchdog over the Circuit Clerk's office in determining when a transcript is delivered to them seems to Petitioners to be a onerous rule and one that is almost impossible to follow. The better rule would be as is found in the Federal Rules of Civil Procedure to require the clerk, the Circuit Clerk herein, to be the one whose duty it is to file the transcript in the higher Court or, that the mailing date controls the perfection time. Your Petitioners would show that the rule in Arkansas is not clear with reference to when the record on appeal shall be filed with the Appellate Court, and for this reason your Petitioners would urge that the filing with the Appellate Court would be the date on which the transcript is mailed to be in accordance with *Ark. Stats. 27-2127.1*.

Further, your Petitioners would point to Rule 11(d) of the Federal Rules of Civil Procedure in that "... the Court of Appeals . . . may permit the record to be transmitted and filed *after* the expiration of the time allowed or fixed." The practice of transmitting the record, docketing the appeal, and filing the record is really outmoded. It belongs to an earlier day when an appeal was regarded as a new proceeding and elaborate proceedings were deemed necessary for its institution. In modern Federal appellate practice it is the *filing* of the Notice of Appeal that is the significant event. Filing of the Notice "perfects" the appeal and invokes a Court of Appeals with jurisdiction over it. Further, looking to Rule 3A of the Federal Rules of Civil Procedure which provides:

"Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the Court of Appeals deems appropriate, which may include dismissal of appeal."

Your Petitioners would argue that timely Notice of Appeal was filed herein and that in accordance with the Federal Rules

of Civil Procedure which the legislature of the State of Arkansas saw fit to base many of their rules upon, that it would be the better practice for the State of Arkansas to follow in theory the Federal Rules to prevent a substantial violation of due process rights as is found in the case at bar. The only untoward effect of the failure to effect timely transmission and filing of the record is a possible delay in the processing of the appeal. It would seem, then, that slight delays ought not to result in refusing untimely transmission of the filing of the record even when the delay is the result of the mistake or even the neglect of the counsel. Counsel for Petitioners are aware, however, that there have been rather harsh decisions in this area. *United States v. Bowen*, 310 F.2d 45 (5th Cir. 1963). Refusal to entertain the appeal punishes the innocent client. It is of the utmost importance that counsel obey the Rules of each Court in which he practices, but each Court should be inventive in resorting to every other device for securing obedience of counsel or the Court Clerk before penalizing innocent litigants.

Further, assuming that this Court would look to the Federal Rules of Civil Procedure in interpreting *Ark. Stat. 27-2127.1*, then this Court may save this appeal from dismissal in the exercise of its supervisory powers. *Belton v. United States*, 259 F.2d 811 (D. C. Cir. 1958). The rule in *Belton* teaches us that the Appellate Court obtains jurisdiction over an appeal at the filing of a Notice of Appeal within time and that where the record was not filed in accordance with the other rules, that such did not oust jurisdiction which had become vested in the Appellate Court. Further, a quote by the late Chief Judge Stevens, in the *Belton*, *supra*, case is such as to be considered in the case at bar:

"In a criminal case in which a sentence of imprisonment is involved, there is a public interest against denial of consideration on appeal of substantial questions as to the lawfulness of the conviction. For if the conviction is er-

roneous, it is abhorrent to justice that a Defendant shall nevertheless suffer such a penalty for the crime charged. The Supreme Court has on this account vested the United States Court of Appeals with discretion to consider and determine questions on appeal notwithstanding failure of counsel to make due compliance with the usual procedural requirements. This discretion may be exercised either on the application of a party or by the Court *sua sponte*."

By analogy and by implication, your Petitioners would urge that the timely filing of the Notice of Appeal in the State of Arkansas shall vest jurisdiction in the Supreme Court of Arkansas and that the Supreme Court of Arkansas shall have full responsibility of the reasonable control over all the proceedings relating to an appeal. This is in conformity with the Federal Rules of Civil Procedure in which by implication shall be followed because of the willingness and the intent of the legislature of the State of Arkansas to base most of their procedure rules upon the Federal Rules of Civil Procedure.

Most of the criminal law of this country is, and should be, enforced in the state Courts. In the course of their discharge of this duty, those Courts will inevitably be asked on many occasions to rule on claims of Federal right. This Court obviously cannot superintend the manifold details of State criminal practice. But it can be alert to see that fairly presented Federal claims are decided in accordance with those rights that are guaranteed to every citizen of the United States. Here, Petitioners' rights to a State Court appeal on the merits of their conviction in the Circuit Court of Miller County, Arkansas are at stake. This case thus presents a frequently recurring problem, that being the conflicts between counsel for Defendants, U. S. Postal Service, offices of the Court, including the Clerks, the Court Reporters, and as such is a problem deserving of this Court's time and attention.

CONCLUSION

The Writ of Certiorari should be granted to review the Judgment of the Supreme Court of Arkansas. On plenary consideration, that Judgment should be reversed and the cause remanded with directions that the Supreme Court of Arkansas lodge the record of Petitioners and consider their appeal.

Respectfully submitted,

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Attorneys for Petitioners

APPENDIX

In the Circuit Court of Miller County, Arkansas

State of Arkansas

Plaintiff,

vs.

No. CR-76-82

Jimmy Murphy,

Defendant.

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that the Defendant, Jimmy Murphy hereby appeals to the Supreme Court of Arkansas from the decision of the Circuit Court of Miller County, Arkansas, handed down on April 18, 1977. The grounds upon which this appeal is taken are:

1. Said decision is contrary to the law;
2. Said decision is contrary to the evidence;
3. Said decision is contrary to law and evidence.

This appeal is not taken for the purpose of delay but is taken for the purpose of having justice done in the entire matter.

Dated this 16th day of May, 1977.

BOYD TACKETT, JR.

421 Hickory

P. O. Box 2631

Texarkana, Arkansas 75502

Attorney for Defendant

In the Circuit Court of Miller County, Arkansas
Second Division

State of Arkansas,	} Plaintiff,	No. CR-76-82.
vs.		
Boyce Neal Patterson and Jimmy		
Wayne Murphy,		

REPORTER'S TRANSCRIPT OF PROCEEDINGS

On this the 26th day of April, 1977 and the 29th day of April, 1977 comes on to be heard the above-styled cause for trial.

APPEARANCES:

Mr. James Gunter, Prosecuting Attorney for the 8th Judicial District and Mr. Kirk Johnson, Deputy Prosecuting Attorney for Miller County, Arkansas, for the State of Arkansas;

Mr. Boyd Tackett, Jr., Attorney at Law, Fifth and Hickory Streets, Texarkana, Arkansas 75502, for the Defendants.

Thereupon, the following proceedings took place before the Honorable J. Hugh Lookadoo, Regular Judge of the 8th Judicial Circuit of Arkansas:

In the Supreme Court of Arkansas

State of Arkansas	Plaintiff
vs.	CR 76-82
Boyce Neal Patterson and Jimmy Wayne Murphy	Defendants

**MOTION TO REQUIRE CLERK TO
DOCKET CASE AS AN APPEAL**

Come the Defendants and for their Motion to Require Clerk to Docket Case as an Appeal, state, allege and say:

I

That a Notice of Appeal and Designation of Record was filed in this cause with the Circuit Clerk's Office of Miller County, Arkansas, on the 19th day of May, 1977, a copy of same is attached hereto and marked Exhibit "A".

II

That on the 3rd day of August, 1977, Petitioners' attorney, Boyd Thackett, Jr., traveled to Arkadelphia, Arkansas in an effort to obtain the transcript of the above-styled and numbered case. That the Court Reporter preparing said transcript was not in his office but later contacted said attorney and an agreement was made concerning said attorney obtaining said transcript. That said attorney made two more trips by automobile to Arkadelphia in an effort to obtain said transcript.

III

That the transcript was mailed to the Miller County Circuit Clerk on the 5th day of August, 1977, and that said transcript

had been in the possession of said Miller County Circuit Clerk since the 8th day of August, 1977, a copy of the face of said transcript is attached hereto and marked Exhibit "B" showing the clerk's file marks of August 8, 1977, thereon.

IV

On the 16th day of August, 1977, said attorney was notified by the Circuit Clerk that she was in possession of said transcript and same was obtained by said attorney on the 17th day of August, 1977. Said transcript was mailed to the Clerk of the Arkansas Supreme Court on that day, being received by the Clerk of the Arkansas Supreme Court on the 19th day of August, 1977.

V

That the main reason for all of the above delay was the fact that the aforementioned court reporter went on vacation on Friday, August 5, 1977, and Petitioners' attorney had no way of knowing that the transcript had been mailed to the Miller County Circuit Clerk's office and even after numerous attempts, including three trips to Arkadelphia, Arkansas from Texarkana, Arkansas and numerous telephone calls to obtain said transcript and timely lodge same with the Clerk of the Supreme Court, it was discovered that the transcript had been mailed to the Miller County Circuit Clerk's office.

VI

That because of the above described circumstances, it would be a serious miscarriage of justice to deny Petitioners their right to appeal this case especially in view of the fact that Petitioners' attorney made every effort to secure the transcript for timely filing and that Petitioners' attorney had no way of knowing the whereabouts of said transcript until being notified

by the Miller County Circuit Clerk eleven (11) days after same was mailed by the Court Reporter to the Clerk.

WHEREFORE, PREMISES CONSIDERED, Petitioners herein pray that this Honorable Court issue an order requiring the Clerk of the Supreme Court to docket this case as an appeal for reasons hereinabove set out and for all other just and proper relief to which Petitioners may show themselves justly entitled.

Respectfully submitted,

By: BOYD TACKETT, JR.

VERIFICATION

I, Boyd Tackett, Jr., on oath state that I am the Attorney for the Defendants in the above entitled and numbered cause and that all the matters and facts set forth in the above and foregoing Motion to Require Clerk to Docket Case as an Appeal are true and correct to the best of my knowledge and belief.

BOYD TACKETT, JR.

SUBSCRIBED AND SWORN TO BEFORE ME, A Notary Public, on this 22nd day of August, 1977.

(Illegible)
Notary Public

(Seal)

My Commission Expires: 3/8/80.

CERTIFICATE OF SERVICE

I, Boyd Tackett, Jr., attorney for Defendants in the above entitled and numbered cause do hereby certify that I have served the above and foregoing Motion by mailing a true copy hereof to Mr. Bill Clinton, Attorney General for the State of Arkansas, Justice Building, State Capitol Grounds, Little Rock, Arkansas 72201, this 22nd day of August, 1977.

BOYD TACKETT, JR.
Attorney for Defendants
421 Hickory Street,
Post Office Box 2631
Texarkana, Arkansas 75502

LAW OR CHANCERY MANDATE

State of Arkansas, }
In the Supreme Court } SCT

BE IT REMEMBERED, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court Room in the City of Little Rock, on the 4th day, being the first Monday of October A. D. 1976, amongst others were the following proceedings, to-wit:

On the 12th day of September A. D. 1977, a day of said term

Jimmy Wayne Murphy	} Appellant	} Appeal from Miller Circuit Court	
vs.			No. CR 76-82
State of Arkansas			Appellee

Motion for Rule on Clerk to lodge transcript is denied.

IN TESTIMONY, That the above is a true copy of the order of said Supreme Court, rendered in the case therein stated, I, JIMMY H. HAWKINS, Clerk of said Supreme Court, hereunto set my hand and affix the Seal of said Supreme Court, at my office in the City of Little Rock, this 12th day of September, A.D. 1977.

JIMMY H. HAWKINS

Clerk

By
D.C.

Filed on 15 day Sept. 1977

At 8 o'clock A.M.

NADINE DUNCAN

Clerk

Deputy